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1-1004-677-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the Proposed Activation of the Minnesota Joint Underwriting Association and the Market Assistance Plan to Insure.Specified Classes of Business.

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck on Tuesday, August 12, 1986 at 9:00 A.M. in Room 5, State Office Building, Capitol Complex, in the City of St. Paul, Minnesota. The hearing continued on August 13 and August 14 of 1986. The hearing record in this matter closed on September 2, 1986 upon receipt of written argument from all parties.

A. James Dickinson, Esq. of the firm of Stringer, Courtney & Rohleder, Ltd., 1200 Northwestern National Bank Building, 55 East Fifth Street, St. Paul, Minnesota 55101, appeared on behalf of Dunsheath Construction and Engineering Company, an asbestos abatement contractor. John Wallberg, Red Barn Riding Stable, 1510 Cartway Drive, Thief River Falls, Minnesota 56701, Michael M. Thomas, Diamond T Ranch. Inc., 4889 Pilot Knob 'Road. Eagan, Minnesota 55122 and Kevin Ward, El Rancho Manana, Cold Spring, Minnesota 56320, each appeared on their own behalf as owners of riding stables. Douglas Stevens, Attorney at Law, 14300 Nicollet Court, Suite 218, Burnsville, Minnesota 55337, appeared on his own behalf as an owner of a water slide. Byron E. Starns, Esq., of the firm of Leonard, Street & Deinard, 100 South Fifth Street, Suite 1500, Minneapolis, Minnesota 55402, appeared representing Ponderosa of Blue Earth Co., Inc., Tellijohn Landfill Services, Inc., Tellijohn Sanitary Landfill, Inc.. Pine Lane Landfill, Inc. and the Elk River Sanitary Landfill, all members of the class of landfills. Mr. Starns also appeared on behalf of the Minnesota Council of the American Electronics Association (AEA), including AEA members Zytec Corporation and ETA Systems, Inc.. each members of the class of electronics/information technology. Gregory T. Halbert, Esq., 7900 Xerxes Avenue South, Suite 1500, Bloomington,

Minnesota 55431, appeared on behalf of Dakhue Lanfill, Inc., and East Bethel Landfill, each members of the class of landfills.

James B. Loken, Esq. and James D. O'Connor, Esq., of the firm of Faegre & Benson 2300 Multifoods Tower, Minneapolis, Minnesota 55402, appeared on behalf of the Insurance Federation of Minnesota, as well as on behalf of the National Association of Independent Insurers, The American Insurance Association and The Alliance of American Insurers. John C. Bjork, Special Assistant Attorney General. 1100 Bremer Tower, Seventh Place and Minnesota Street. St. Paul. Minnesota 55101, appeared on behalf of the Department of Commerce.

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions and Recommendations contained in this Report. Minn. Laws 1986, Chapter 455, 41, subd. 3, provides that the hearing in this case and all matters after the hearing are a contested case under Ch. 14. Minn. Stat. 14.61 provides that the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. It provides that an opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. However, Minn. Laws 1986, Ch. 455, 41, subd. 4, provides that the Commissioner shall make a decision in this case within ten (10) days of receipt of the Administrative Law Judge's Report. Parties should contact Michael A. Hatch, Commissioner, Minnesota Department of Commerce, Fifth Floor, Metro Square Building. Seventh & Robert Streets, St. Paul. Minnesota 55101 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues to be determined in this contested case proceeding are whether activation by the Commissioner of Commerce of the Market Assistance Plan (MAP) and the Joint Underwriting Association (JUA) is necessary beyond the 180-day period, i.e.. whether the class members have shown that they were (1) unable to obtain insurance through ordinary means and (2) that the insurance sought is either (a) required by statute, ordinance or other law, or (b) is necessary to earn a livelihood or conduct a business and serves a public purpose.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Matters.

1. On May 26, 1986 the Commissioner of Commerce published a notice of temporary activation of the Minnesota Joint Underwriting Association (JUA) and the Market Assistance Plan (MAP) to insure the following classes of business: day care providers, foster parents, foster homes, developmental achievement

centers, group homes, sheltered workshops, citizen participation groups, recreational facilities, electrical inspectors, architects, design engineers, absestos abatement contractors, environmental contractors, volunteer guardianship providers, directors and officers of non-profit agencies, home health aides and crane operators. The notice was published at 10 State Register 2346. (Ex. A).

2. CA June 2, 1986 the Commissioner published a notice of temporary activation of the JUA and MAP to Insure the class of "landfills (does not include environmental impairment liability coverage)". This notice was published at 10 State Register 2419. (Ex. A).

3. On May 28, 1986 the Commissioner of Commerce filed a petition dated May 26, 1986 with the Chief Administrative Law Judge requesting the assignment of an Administrative Law Judge to conduct a hearing to determine whether activation of the JUA and the MAP beyond 180 days is necessary. (Ex. B).

4. On June 16, 1986 the Commissioner of Commerce published a notice of hearing for the classes of business set out in Finding of Fact No. 1. It was published at 10 State Register 2513. (Ex. A).

S. On July 7, 1986 the Commissioner of Commerce published a "notice of activation to ensure specified classes of business and public hearing" which contained three additional classes, namely, grain buyers licensed pursuant to Minn. Stat. 223.17, public grain warehouse operators licensed pursuant to Minn. Stat. 232.22 and businesses engaged in the research and development and manufacture of components and products in the electronics or information technology industries. This notice was published at 11 State Register 10. (Ex. A).

6. On August 4. 1986 the Commissioner of Commerce published a notice of deactivation of the JUA for the following classes of business: crane operators, architects, design engineers, volunteer guardianship providers, directors and officers of non-profit agencies, recreational facilities (except 7or riding stables and water slides) and home health aides. The notice was published at 11 State Register 143. (Ex. A).

7. A prehearing conference in this matter was held on August 5, 1986. It was agreed by all parties that those classes of business specifically set out in the statute at Minn. Laws 1986, Ch. 455, 21, subd. 1 would qualify for JUA coverage without appearing at the hearing or presenting any evidence. Those classes are day care providers, foster parents, foster homes, developmental achievement centers, group homes, sheltered workshops and citizen participation groups.

8. Four classes of business failed to have any, member appear at the hearing of this matter and cannot, therefore, be considered in this proceeding. They are grain buyers, public grain warehouse operators, environmental contractors and electrical inspectors. Therefore, the classes which appeared at the hearing and which are-properly considered in this contested case proceeding are: asbestos abatement contractors. riding stables, water slides, landfills, and businesses engaged in the research and development and manufacture of components and products in the electronics or information technology industries.

Asbestos Abatement Contractors.

9. Dunsheath Construction and Engineering, Inc. (Dunsheath) is owned by Heather Dunsheath and has been in the business of asbestos abatement contracting since 1980. The firm removes asbestos from existing buildings, such as from pipes and boilers, during the renovation of the buildings. Exposure to asbestos can cause cancer or asbestosis, a chronic disease of the lungs. The diseases do not show up until 20 to 40 years after exposure. (Ex. 9).

10. During 1984 Dunsheath had a comprehensive general liability (CGL), insurance policy with Aetna Life and Casualty. Dunsheath was notified during 1984, however, that its policy would not be renewed when it expired on December 26, 1984 "due to the severe loss potential inherent in asbestos removal" (Ex. 1).

11. Dunsheath then obtained a CGL policy from Lloyds of London through the firm of Cobb, Strecker, Dunphy & Zimmermann for the period January 16, 1985 to January 16, 1986. The policy had limits of $500,000, although Dunsheath had sought $1 million limits. (Ex. 3). The policy also provided considerably less protection than the Aetna policy. It contained an "asbestos exclusion" and did not include a broad form contractual liability insuring agreement. It also did not contain broad form property damage coverage. (Ex. 2). The asbestos exclusion excluded coverage for indemnity or defense for any claim arising out of alleged sickness or disease occasioned by the insured's operations involving asbestos or similar materials. (Ex. 3).

12. On November 25, 1985, Dunsheath received notice that its CGL policy with Lloyds of London would be cancelled effective January 16, 1986. (Ex. 4).

13. Dunsheath then began to search for liability insurance. The firm which helped them obtain the coverage from Lloyds of London, Cobb. Strecker, Dunphy and Zimmermann, contacted seven insurance companies but found that none would issue a CGL to Dunsheath without an asbestos exclusion. (Ex. 4A, p. 2). It also contacted Kathy Gallagher of the John H. Crowther Agency who told him that the only insurance her agency could provide was through Great American Surplus Lines Insurance Company. (Ex. 4A, p. 1). Cobb also contacted Casualty Underwriters, Inc., an excess and surplus lines agency. but they could not provide a CGL policy without an asbestos exclusion. (Ex. 4A, p. 2).

14. The policy from Great American Surplus Lines Insurance Company was a general liability policy with limits of $500,000 at a premium of 15-20% of gross revenues. (Ex. 5). The policy was written on a "claims made" basis, which means that it provided coverage only for claims made during the policy period. Dunsheath determined, in consultation with its insurance agent, that such a policy did not provide it effective coverage due to the latency period for asbestos related diseases and due to an exclusion in the policy for employees whose job duties required them to be in an asbestos abatement area. (Ex. 4A, pp. 1-2; Ex. 5. last page1-

15. The construction projects upon which Dunsheath bids require it to have comprehensive general liability insurance. The specifications for an asbestos abatement project at the State Transportation Building issued April 18, 1986 required comprehensive liability insurance protecting the contractor "from claims for damages for bodily injuries, including sickness, disease. or death and for care and loss of services, as well as from claims for property damage including loss of use. which may arise from operations under the Contract, whether such operations be by the Contractor or by any subcontractor, or by anyone directly or indirectly employed by either of them." The minimum amount of insurance specified was $250,000 for damages for bodily injury for each person and in the total amount of not less than $600,000 for injuries resulting from one occurrence. (Ex. 6). A March 1, 1985 specification for similar work to be done for the State University Board contained the same language. (Ex. 6).

16. Contracts with private firms also call for contractors such as Dunsheath to have comprehensive general liability insurance. On August 8, 1986 Minnesota Mining & Manufacturing Company advised Dunsheath that it was obligated to maintain CGL insurance with limits of at least $1 million dollars under the terms of their contract. (Ex. 8).

17. On June 17, 1968 Dunsheath applied to the Minnesota JUA for a commercial general liability policy with limits of $1 million dollars per occurrence for bodily injury and $1 million dollars per occurrence for property damage. (Ex. 7). As of the date of the hearing It had not yet been issued a policy. Dunsheath has been uninsured as to general liability insurance since January of 1986.

18. There are approximately 20 asbestos abatement contractors in Minnesota. This type of work is highly regulated by both federal and state agencies including OSHA and the Environmental Protection Agency. (Ex. 11). The Dunsheath firm is engaged in both removal and encapsulation of asbestos. The firm maintains a good deal of specialized equipment including a negative air pressure system, asbestos vacuums and HEPA filters. It employs a full-time certified industrial hygienist and trains its workers to avoid health problems. Its worksites are barricaded and air samples are taken on every job each day.

19. Ile Dunsheath firm has never made a claim to any insurer and has never been sued. It has never had any OSHA or EPA citations or fines and has incurred no penalties on its contracts.

Riding Stables.

20. John Wallberg owns and operates the Red Barn Riding Stables near Pequot Lakes, Minnesota and near the Breezy Point Resort. His riding stable had liability insurance with Lincoln Insurance Co. through 1983 at an annual premium of $1,200. In 1983 Lincoln advised him that they were no longer writing that class of business. (Ex. 73; Ex. 76, p,. 1). The stable was then insured with Interstate Fire & Casualty Co. for two years at a premium of $1,419 for 1983 and $1,526 for 1984. (Ex. 73; Ex. 76, p. 1). Interstate advised Mr. Wallberg that it would no longer- write his type of business in late 1984. During 1985 his insurance agent, Linda Liestman with the Ark Agency, commenced a search for insurance. The Ark agency specializes in animal insurance. Liestman contacted several insurance companies and special risk brokerages but was unable to find one to write the coverage. (Ex. 76).

Exhibits 73 through 77 were submitted by Mr. Wallberg after the hearing.
The attorneys for the Insurance Federation orally advised the Administrative
Law Judge that they had no objection to receiving the exhibits into evidence.

2 1 Mr. Wallberg finally obtained coverage through the High Country Insurance agency with Constitution State Insurance Co. for 1985-86 at an annual premium of $5,880. (Ex. 73). Because of the higher premium, he had to raise his rates from $7.50 per hour to $10 per hour which resulted in a 16% decrease in riders and an operating loss of $10,000. (Ex. 73). On May 1, 1986 Mr. Wallberg was notified that his liability coverage would terminate on June 1, 1986 because Constitution State was no longer writing this class of business. (Ex. 76).

22. During 1986, Mr. Wallberg or insurance agents on his behalf contacted several more insurance companies or brokerages, including the Rhulen Agency, Inc., E. & S. Midwest Agency, and Constitution State Insurance Company, without finding any company who would write the coverage. (Ex. 76).

23. On May 15, 1986 the Knapp Agency advised Wallberg that they could insure him with $300,000 limits for an annual premium of $10,000. (Ex. 74). Wallberg then proceeded to close down his riding stable from June 1 to June 20, 1986 since he could not make a profit with a premium of that amount. (Ex. 74). During that time he applied to the Minnesota JUA and was issued a liability policy at an annual premium of approximately $4,500. He was advised on August 5, 1986 that the MAP was unable to secure coverage for him. (Ex. 76).

24. Mr. Wallberg's business provides one hour trail rides to patrons who are referred to him from resorts such as Breezy Point, Grandview Lodge and Island View Lodge as well as clientele from campgrounds in the area. His trails cross his property which he leases from others including Arthur C. Nickel and Whitebirch at Breezy Point. Each has advised him he must have liability insurance to use their land. (Ex. 75) Resorts in the area will not recommend customers to him if he is not insured. Other stables in his area are operating without insurance, however.

25. Mr. Wallberg's stable has made only one claim in six years which covers approximately 25,000 riders.

26. Michael M. Thomas manages the Diamond T Ranch in Eagan, Minnesota. .The ranch maintains 20 horses for rental trail rides. The ranch rents trails in Dakota County Parks to carry on its business. Approximately 35% of its business comes from the Girl Scout organization.

27. The contract between Diamond T Ranch and Dakota County governing the use of trails in the County's parks provides that the Ranch must carry general liability insurance in an amount of not less than $300,000 for injury to or death of any one person and $600,000 for total injuries and/or damages arising from any one occurrence. (Ex. 29, p. 4). Additionally, the Girl Scout Council does not do business with horseback riding stables that do not carry liability insurance. (Ex. 30). Other agencies such as the Minnesota Department of Natural Resources requires liability insurance (with $200,000/$600,000 limits) before contracting with a horseback riding business. (Ex. 28).

28. On February 15, 1985, Diamond T Ranch received notice that its liability insurance with Interstate Fire and Casualty Company would be cancelled effective April 27. 1985 because the company was no longer providing a market for saddle animals for hire. (Ex. 33). Mr. Thomas then began to

seek other liability insurance. He submitted an application dated December 30, 1985 to the Rhulen Agency, Inc. He was advised In March of 1986 that Rhulen was no longer writing insurance for horses for hire or trail rides. (Ex. 31; Ex. 32). Diamond T Ranch also contacted Insurance by Knapp and was advised that coverage for horses for hire was rat available (Ex. 35). Mr.
Thomas also contacted several other agencies or insurance companies.

29. On May 29, 1986, Dakota County advised Diamond T Ranch that the park would not be available for commercial use by people renting horses from the ranch due to the ranch's lack of liability insurance. (Ex. 36). Subsequently, the Ranch obtained a temporary permit allowing them to use the park pending their application for insurance to the JUA. The Girl Scouts ceased using Diamond T Ranch for a period of time when the Ranch was without liability.insurance. They returned after the Ranch obtained liability insurance.

30. In July of 1986 Diamond T Ranch made an application to the Joint Underwriting Association for a commercial general liability policy. On August
5, 1986 the Ranch was advised that the Market Assistance Program could not secure coverage for it. (Ex. 34). The JUA then issued a policy with a $100,000 liability limit to the Ranch at a premium of $350 per horse for ten horses. (Ex. 37). Diamond T. Ranch would not be able to stay in business if
it had to pay an annual premium of $10,000 for liability insurance.

31. Kevin Ward is manager of El Rancho Manana Inc. which has saddle animals for hire near Cold Spring, Minnesota. El Rancho Manana was insured by
American Centennial Insurance Company from June of 1982 to November 26, 1984. (Ex. 38, 39, 40, 41). The annual premium was approximately $4,800 with liability limits of $300,000 for each occurrence. The liability insurance covered 15 saddle animals for hire. It was cancelled in November of 1984. (Ex. 41).

32. El Rancho Manana was able to find a general liability policy with Pine Top Insurance Company from June 24, 1985 through June 24, 1986. (Ex. 42). The total premium was $9,000 to cover 20 saddle animals for hire with $300,000 limits of liability. El Rancho Manana had to increase its fees for riding due to the higher premium and then experienced a drop in business of approximately 50%.

33. Pine Top Insurance Company would not renew its policy with El Rancho Manana and it expired in June of 1986. (Ex. 45). El Rancho Manana's insurance agent then applied to Rhulen Agency, Inc. but was advised in June of
1986 that it was not providing a market for trail rides. (Ex. 44; Ex. 45). The insurance agent from the Jennings Agency, Inc. advised Mr. Ward that Rhulen and Pine Top were the only two companies still writing horse insurance. (Ex. 45). The Ark agency was unable to find.coverage for El Rancho Manana either.

34. The only claim made against El Rancho Manana was incurred 12 to 14 years ago and involved an arm or leg injury. Its horseback rental business has contracted because it has had to increase the cost of a trail ride because

of the increase in its insurance costs. It could afford an annual premium of approximately $450 per horse and still stay in business.

35. El Rancho Manana's experience is that non-profit organizations and schools will not contract with a horse rental firm if they are uninsured. El Rancho Manana has not been providing horseback riding for rental since its insurance expired.

36. During July of 1986, El Rancho Manana applied to the JUA for insurance coverage. It was advised by the Market Assistance Program that it was unable to secure coverage for El Rancho Manana on August 5, 1986. (Ex. 43). An of the date of the hearing, El Rancho Manana had not had a policy issued from the JUA.

Waterslides.

37. Douglas M. Stevens is President of the Burnsville Beaver Mountain Waterslide. There are approximately 12 waterslides in Minnesota. The facility includes three long (300 foot) flume waterslides, a landing pool and related filter and pump room. The waterslide is designed to be a family activity and has special family nights. The facility also serves handicapped groups which allows counselors and staff free access with their groups. The facility provides jobs for college and high school youth during the summer. (Ex 12, pp. 1, 3).

38. The facility was insured from June of 1985 to June of 1986 by City Insurance Company at a premium of $9,750 for $1 million dollar limits of liability. (Ex. 12A).

39. On January 30, 1986 the facility was advised that it would not have coverage past June 7, 1986 since the insurance company was no longer underwriting this type of coverage. (Ex. 12D). The insurance agency, Frank B. Hall and Company stated that it had been unsuccessful in securing another insurance market for the coverage. (Ex. 12D).

40. The facility then began to search for other insurance coverage. Nationwide, most of the insurance companies writing water park insurance withdrew due to a lack of re-insurance and poor claims experience. (Ex. .12C) It contacted the High Country Insurance Agency, which had handled over 200 water parks in the past, without success. Although the High Country Insurance Agency attempted to establish an alternative to insurance company coverage there was no program in effect as of June of 1986. (Ex. 12C; Ex. 12, p. 6). The facility also contacted Frank B. Hall and Company, which had handled 300 water parks in 1985, but it was unable to provide insurance. (Ex. 12, p. 6).

41. In May of 1986 the World Water Park Association advised the facility that four agencies or insurance companies were providing coverage. (Ex. 12E). The facility contacted each of them. One required minimum receipts of $700,000 for which the facility did not qualify. Another was a Bermuda captive company which was not pursued. A third advised the facility that sufficient premium had not been tendered by the industry to write the insurance . The facility did receive an offer orally for coverage from the Aquatic Recreation Insurance Company of Bermuda. However, the company

required it to wire a premium of $16,000 to Bermuda before the contents of the

policy would be identified. Since the company was not regulated in Minnesota, the facility determined to pursue an alternative course of action. (Ex. 12, P. 7; Ex. 128-2; Ex. 12F).

42. On May 29, 1986 the facility applied to the Minnesota Joint Underwriting Association for insurance coverage. (Ex. 12B-1; Ex. 12B-3). On July 14, 1986 the facility was advised that the MJUA was not presently authorized to provide coverage since it needed to adopt the policy forms and a rate schedule. As of the date of the hearing the facility remained uninsured and its application was pending with the JUA.

43. The facility is being purchased by its owners on a contract for deed from the prior owner. A condition of the contract for deed is that the buyers will maintain liability insurance on the premises.

Landfills: (Does not include environmental impairment liabilitv coveraqe).

44. It state laws or rules require landfill operators to have comprehensive general liability (CGL) insurance. However, ten counties require landfills to have CGL insurance and five counties require landfills to have surety bonds. (Ex. 13, p. 1). Successful damage claims against landfill operators in the absence of insurance would impair landfill assets set aside for site closure or post-closure care. Also, insurance problems can lead to temporary site closings which leads to disruptions as haulers shift to other landfills-at an increased cost. (Ex. 13, p. 2).

45. Lucille Wiemart owns and operates a landfill near Mankato which is operated under the name of Ponderosa of Blue Earth County, Inc. The company has been in business since November 1, 1972. It has been continuously insured since that time. The landfill has sufficient land to continue in operation for 50 to 75 years. It is insured through September 1, 1986 by the Jefferson Insurance Company of New York at $500,000 limits of liability. (Ex. 16, p. 2). In June of 1986, however, the agency which placed this insurance, Blackburn, Nichols and Smith advised that it had no other market to place this coverage after expiration of the policy on September 1 1986. (Ex. 16, p. 13).

46. Prior to the coverage through Blackburn. Nichols and Smith, the landfill was insured by the RLI Insurance Company through the John H. Crowther Agency. The policy period was June 1. 1985 through June 1. 1986 at $1 million dollar limits of liability. (Ex. 16, p. 15). On April 30, 1986 Mrs. Weimart was advised that this policy would expire on June 1, 1986. Her insurance agency advised that they contacted all other markets and had not been successful in finding a replacement for the coverage at the time. (Ex. 16, p. 1).

47. The landfill made an application to the Minnesota JUA for coverage and was advised by the Market Assistance Program that it had been unable to secure coverage for the landfill on August t 1986. (Ex. 16A).

48. Blue Earth County ordinance requires the landfill to maintain general liability insurance in an amount of at least $300,000 for injury or death of any one person in any one occurrence and aggregate bodily liability in an amount of at least $500,000 for injuries or death arising out of any one occurrence. (Ex. 17. pp. 2-3).

49. Thomas Tellijohn is President of Tellijohn Sanitary Landfill, Inc. which owns and operates a landfill near LeSueur . Minnesota in LeSueur County. The Tellijohn family has operated the landfill since 1968.

50. In February of 1986 the landfill was advised that its general liability policy with General Casualty Company of Wisconsin would not be renewed as of July 1, 1986 because the insured did not meet company underwriting requirements. (Ex. B). The landfill then began to seek other coverage and was turned down for coverage by General Casualty, Firemen's Fund, Auto Owners, Empire, Northland, National Indemnity, and Western Insurance Companies. An application to American Business Insurance Agency, Inc. did not produce any coverage. (Ex. 14, p. 2; Ex. 14-C). It contacted four local insurance agencies and one Twin Cities agency.

51. The LeSueur County Solid Waste Management System Plan provides that all contractors operating in LeSueur County must have public liability insurance with $100,000/$300,000 limits. (Ex. 15; p. 16). Tellijohn's permit with the county requires a certificate of insurance covering public liability as prescribed in the Solid Waste Disposal Plan. (Ex. 14-D, p. 1). Tellijohn's contracts with local government entities for the collection of solid waste requires the maintenance of general liability insurance. (Ex. 14, p. 3). Although the landfill's liability coverage has expired the County has allowed the landfill to put up a letter of credit, which will expire in early September 1986. in lieu of insurance.

52. On June 24, 1986 the Tellijohn landfill applied to the Minnesota Joint Underwriting Association for insurance coverage. (Ex. 14). It presently has no insurance 'for the landfill.

53. Cameron Strand owns and operates the Pine Lane _Landfill, Inc. near Chisago City. Mr. Strand's landfill had general liability insurance for a number of years through Mutual Service Casualty Insurance Company. The coverage was-for $500,000 limits of liability. (Ex. 18. p. 12). On March 25, 1985 he was advised that his coverage would not be renewed effective June 4, 1985 because Mutual Service was no longer writing this class of business.

54. The Landfill then obtained a policy of insurance with Casualty .Underwriters, Inc. through the Twin Pines Agency in St. Paul which was effective through June 4. 1986. The policy provided owners, landlords and tenants liability coverage with $500.000 limits. (Ex. 18, pp. 24, 29). In January of 1986 the Landfill was advised that the policy with Casualty Underwriters, Inc. would not be renewed.

55. The Landfill is presently without general liability insurance. Mr. Strand's insurance agent has been unable to obtain a quote for liability insurance on the landfill. Mr. Strand has never had any claims at his facility against his liability insurance.

56. Chris Kreger is Vice-President of the Elk River Sanitary Landfill which operates in Sherburne County near Elk River. The landfill is the fifth largest in the-state out of 120 landfills.

57. The Landfill was insured by Constitution State Insurance Company through May 29, 1986 for comprehensive general liability insurance at $300,000 limits of liability. The premium was approximately $4,900. (Ex. 19. pp. 7-8). No claims were made against the policy.

58. Prior to May of 1986 Mr. Kreger was advised that the liability insurance with Constitution State Insurance Company would not be renewed. His insurance agent then talked to a number of underwriters to obtain coverage. An attempt was also made through the ABI Agency to place the coverage. The only possibility uncovered was insurance through Lloyds of London. However, the minimum premium was $50,0OO per year which would require the Landfill to close.

59. The Sherburne County Solid Waste ordinance requires a licensee to furnish to the county certificates of insurance showing general liability coverage in an amount of at least $100,000 per injury or death of any one person in any one occurrence and aggregate bodily liability in an amount of at least $300,000. (Ex. 19, pp. 1, 3). The Landfill's license with the County expires September 1, 1986 at which time the County could refuse to renew the license since the Landfill currently has no insurance coverage.

60. Mr. Kreger has made an application to the Minnesota Joint Underwriters Association.

61. Marilou J. Welt is Secretary-Treasurer of Dakhue Landfill, Inc. a landfill located in southern Dakota County. She operates the landfill with her husband and father.

62. The Dakhue Landfill has general liability insurance effective through September 8, 1986 with the St. Paul Fire and Marine Insurance Company with limits of liability of $1 million dollars. (Ex. 55). Its premium with the St. Paul Companies for 1985-86 was $2,005. St. Paul has insured the landfill since 1980. (Ex. 54, p. 8). On July 7, 1986 Dakhue was advised that its coverage would not be renewed due to a change in the company's underwriting position regarding this class of business. (Ex. 53). Dakhue's insurance agent contacted three insurance companies as well as an insurance broker but could not find a company willing to write liability insurance for a landfill. (Ex. 54, p. 2).

63. The Dakhue Landfill is licensed by the Dakota County Human Services

Board under the Dakota County Solid Waste Management ordinance. The ordinance requires a landfill licensee to furnish the county with certificates of insurance providing public liability insurance in the amount of at least $250,000 for injury or death to any one person and bodily injury liability in an amount of at least $750,000 for other injuries arising out of any one occurrence. (Ex. 61, p. 6). The Solid Waste ordinance was amended on March 18, 1986 to permit the Human Services Board to approve a letter of credit in lieu of insurance requirements in an amount to be set by the Human Services Boar& (Ex. 60). Dakhue was advised that it would have to provide a letter of credit of $750,000 but does not have the resources to permit it to obtain a letter of credit in that amount.

64. Dakhue has had only one claim in 15 years which resulted in a neighbor being paid $125 when his cow choked on a piece of trash allegedly blown from the landfill (Ex. 54, p. 3).

65. On August 12, 1986 Dakhue Landfill applied to the Minnesota Joint Underwriting Association for insurance coverage. It seeks $250,000/$750,000 limits of liability (Ex. 54).

66. Vernon Sylvester operates the East Bethel Sanitary Landfill in Anoka County. He has operated the Landfill for 15 years and has never had any claim against his insurance. The Landfill caters to people in the building trades and lumberyards.

67. From 1983 through 1985 the landfill was insured by Great Southwest Insurance Company at limits of liability of $300,000 plus $1 million dollars excess coverage. (Ex. 58, p. 9). That coverage was not renewed, however. Mr. Sylvester's insurance agent, William Steele, then began searching for new coverage. In October of 1985 , six agencies were contacted looking for coverage to $750,000 limits of liability with a negative reply from each. (Ex. 58, pp. 20-22). An attempt to find coverage with five more agencies by James M. King and Associates, Inc. was unsuccessful at the end of 1985. (Ex. 58, pp. 14-19).

68. A policy of insurance was obtained for the East Bethel Landfill through the Blackburn, Nichols and Smith agency with Terra Nova Insurance Company for July 1, 1985 to July 1, 1986. The coverage, however, was for owners, landlords and tenants liability with a premium of $1,500. The limits of liability were only $500,000. (Ex. 56). On April 29, 1986 the Landfill was advised that its policy with Terra Nova Insurance Company would be not renewed as of July 1, 1986. (Ex. 57).

69. Mr. Steele continued to attempt to find coverage -for East Bethel Landfill in 1986. The Americana Insurance Agency was unable to place any coverage and the same was true for Blackburn, Nichols and !Smith. (Ex. 58, pp.

70. The Anoka County Solid Waste ordinance requires licensees to furnish to the County certificates of insurance including a general liability insurance with limits of $250,000/$750,000. (Ex. 59, p. 5). The license for the East Bethel Landfill expired on July 1, 1986 and was not renewed because the Landfill had no general liability insurance. Mr. Sylvester continued to operate the Landfill and was charged by the County with a gross misdemeanor for operating a landfill without a license.

71. An amendment to the Solid Waste ordinance dated March 18. 1986 permitted a reduction in liability coverage to $500,000 for certain landfills and permitted a letter of credit in lieu of insurance if insurance coverage was unavailable. (Ex. 59). Mr. Sylvester determined that the 100% backing necessary for a letter of credit would hamstring his business.

72. On August 12, 1986 East Bethel Landfill applied to the Minnesota Joint Underwriting Association for insurance coverage. It seeks liability

coverage in the amount of $500,000. (Ex. 58, pp. 1-4).

73. There are presently 99 landfills operating in Minnesota with 46 of them being privately owned. A survey of 18 privately owned landfills who are members of the Minnesota Chapter of the National Solid Wastes Management Association determined that 12 of the landfills have had their general liability insurance cancelled or have been notified that their insurance company will not renew coverage. (Ex. 20, pp. 1-2).

Businesses Engaged in the Research and Development and Manufacture of Components and Products in the Electronics or Information Technology Industries.

74. John B. Rogers is the chief financial officer of Zytec Corporation located in Eden Prairie, Minnesota. Zytec makes power supplies for computer-related markets. The corporation has 600 employees in Minnesota including 35 to 40 in its engineering group. Zytec was created in a leveraged buy out of Magnetic Peripherals which was a joint venture of Control Data Corporation (CDC). CDC currently owns 7% of Zytec and will eventually have no ownership. Zytec has not yet been in business for five years and therefore cannot show a five-year history of financial performance. It had a loss in 1985.

75. Zytec had directors and officers liability insurance through November of 1985 from the Federated Insurance Company through the Chubb Agency. At that time Chubb cited Zytec's debt equity position and reliance upon one major customer, as well as its short history, as reasons why coverage would not be renewed. (Ex. 25A, p. 4). Zytec asked the Alexander and Alexander Agency to replace the coverage but it was unable to do so in November of 1985. (Ex. 25A, p. 4). In February of 1986 Alexander and Alexander again attempted to place this insurance without success. (Ex. 25A, p. 1). Another attempt was made in May of 1986 by Alexander and Alexander without success. Mr. Rogers did assemble a package of financial information and a business plan to submit to two insurers. He also offered to visit with any insurers. Alexander ad Alexander cited the fact that Zytec was less than three years old, was in a distressed industry and was not profitable in 1985 as factors working against Zytec (Ex. 25A, p 3).

76. Zytec believes that a strong Board of Directors is necessary to its success. A strong Board is important to debt financing as well as to taking the corporation public. Directors and officers liability insurance is necessary to attract a director with a substantial net worth. There are currently two vacancies on the Zytec Board of Directors and the corporation lost one potential outside director due to the lack of liability insurance. (Ex. 26). No one has resigned from the Board, however, since the directors and officers liability insurance was cancelled.

77. Steven E. Hemping is Vice President of ETA Systems, Inc. a designer and manufacturer of supercomputers located in Energy Park in St. Paul. The firm has been in existence for three years and employs 500 people. The firm is a spinout of Control Data Corporation and Control Data Corporation owns a majority of the shares of ETA Systems. ETA Systems had directors and officers liability insurance through Control Data Corporation until mid-1985 when Control Data lost its insurance.

78. ETS Systems currently has 8 directors, two of whom are independent.

Currently there are four Control Data Corporation officers on its Board. The company sees directors and officers liability insurance as important since it may want to go public and will need strong outside directors to do that. One of the outside members of its Board of Directors resigned in January of 1986 due to the lack of insurance. Its efforts to replace the Director who resigned have not been successful due to the insurance problem. Two other Directors have also expressed concern. (Ex. 25-B).

79. When ETA Systems was first formed the company made contacts to brokers to obtain Directors and officers liability insurance but were discouraged because they had little history where in a high tech industry and were basically in a research and development phase. The Marsh and McLennan and Alexander and Alexander agencies were contacted at that time. In early 1986 ETA did submit a formal application to the David Agency, however, it was not able to find coverage. After it lost the coverage in 1985, ETA Systems amended its by-laws to indemnify its directors in the event of a lawsuit.

80. VI Traynor is staff director of the Minnesota Council of the American Electronics Association (AEA) which has 100 member companies. AEA members in Minnesota employ 81,000 people and have a payroll of $2 billion dollars. Because of the difficulty its members were having finding directors and officers liability Insurance the national American EIectronics Association attempted to assemble its own insurance coverage for members and did obtain a preliminary commitment for coverage for six member companies, but none of them were located in Minnesota. (Ex. 27, p. 2). Twelve Minnesota companies had applied for the AEA program but none were approved. Approximately 35% of the members in Minnesota would not meet the criteria for the AEA insurance coverage because they have not been in business for three years. The AEA program has been suspended because the market cannot get reinsurance.

81. Thirteen AEA Minnesota members were surveyed concerning officers and directors liability insurance coverage needs. Those reporting that they had no coverage and needed help included Lee Data Research Inc., Zytec Corp., Nortronics and Eden Tech. (Ex. 26; Ex. 27). TSI Byson Instruments Network Systems and ADC Telecommunications reported that they had obtained insurance but at a significant increase in premium. (Ex. 26; Ex. 27).

82. Electronics and high technology companies in their formative years are typically undercapitalized and need to qualify for bank venture capital financing. It is very difficult for them to do so if they cannot attract well known outside directors. Such directors are not willing to serve on the boards of new companies without Directors and Officers coverage. This may prevent young companies from developing and adding new jobs in Minnesota. (Ex. 25).

8#. On June 19, 1986 the Minnesota Council of the AEA requested activation of the JUA and the MAP for the class of electronics and high technology companies. (Ex. 25).

84. There are approximately 2,500 technologically intensive companies in the State of Minnesota. Approximately 10-15% of the state's work force Is engaged in this industry. Some 84,000 employees are employed in the electronics industry in Minnesota. It is the position of the Minnesota Department of Energy and Economic Development that the unavailability of directors and officers liability insurance will inhibit the ability of these

companies to function and it is the Department's opinion that such insurance serves a public purpose.

The Insurance Industry.

85. The Home Insurance Company of Indiana is an underwriter for-Directors and Officers liability insurance and has its home offices in New York City. Since June 15, 1986, Home Insurance has had open for business a reorganized

directors and officers department which is employing a new philosophy of underwriting. Traditionally, the financial information from a company was the most important piece of data in determining whether to issue coverage. Approximately 90% of the writers of directors and officers insurance in the U.S. continue to operate with this traditional philosophy. The Home Insurance Company is now willing to look at companies that may not be! currently profitable and has positioned itself to look at companies which are having trouble finding coverage. The senior underwriter for the directors and officers liability division of the Home Insurance Company stated that there would be at least a 50-50 chance that his company would offer coverage to Zytec Corp. but stated that it would not issue coverage to ETA Systems because it was a subsidiary of Control Data Corporation. An insurance company would be concerned about exposure to Control Data's liability if they insured the subsidiary.

86. Most insurance agents are not sophisticated concerning directors and officers liability insurance. There are knowledgeable brokers in Minnesota, however, such as Alexander and Alexander, Marsh and McLennan and The John H. Crowther Agency. Most directors and officers underwriters are located at home offices or, if not, need home office approval for underwriting. The most common directors and officers coverage claim is a shareholder suit alleging improper conduct by directors.

87. An excess and surplus lines insurance broker is one who writes unusual risks and who deals with individual license agents in placing business which is more difficult to write. Normally, individual insurance agents contact such brokers after having trouble placing the coverage for a client. In the case of an unusual risk such as landfills or asbestos abatement contractors, detailed information is needed from a risk in order to provide a quote for such insurance. (Ex. 63; Ex. 64). The John H. Crowther Agency in Minneapolis has recently provided CGL coverage for asbestos abatement contractors. It has recently been contacted by approximately 18 such contractors of whom 12 were provided quotes.. Some of those not quoted did not provide the appropriate information or were discouraged by the minimum premium involved. Approximately six of those quoted purchased the insurance. The insurance was written through Great American Surplus Lines. Others offering similar coverage include U.S. Coastal, Accredited National and AIG. American

International Companies (AIG) is a program for qualified asbestos removal contractors which has a minumum premium of $100,000. (Ex. 70).

88. Most comprehensive general liability policies written prior to 1984
contain a pollution exclusion clause written in 1973 by the Insurance Services.
Office (ISO). The exclusion read as follows:

> POLLUTION. We won't cover injury or damage caused by the discharge. dispersal, release or escape, of pollutants such as:
>
> smoke, vapor, soot or fumes;
>
> acids. alkalis, toxic chemicals, liquids or gases; or
>
> waste material or other irritants or contaminants.
>
> But this exclusion won't apply to sudden accidents involving pollutants.

This exclusion applies whether or not the claim is based on liability assumed under any contract or agreement.

(Ex. 55, p. 407).

The insurance industry intended that coverage would be provided to sudden accidents involving pollutants, but not gradual occurrences. At least one court decision however, a New Jersey state court decision afforded coverage to a situation involving gradual pollution. There has been no appellate court decision interpreting this clause in Minnesota 2.

89. Io 1984 the ISO developed a pollution exclusion which is intended to be absolute. It was adopted by a number of insurance companies for use in their commercial general liability policies and reads as follows:

POLLUTION. We won't cover bodily injury, property damage or medical expenses that result from pollution at or from:

your premises;
a waste site; or
your work site.

Nor will we cover bodily injury, property damage or medical expenses that result from pollution caused by waste pollutants.

We also won't cover any loss, cost or expense that results from any governmental request or order that you test for, monitor clean up, remove, contain, treat, detoxify or neutralize pollutants or waste pollutants.

POLLUTION means the actual, alleged or threatened discharge, dispersal, release or escape of pollutants.

POLLUTANTS mean any solid, liquid, gaseous or thermal irritant or contaminant, including:

smoke. vapors, soot, fumes;
acids, alkalis. chemicals; and
waste.

2 Given Conclusion No. 12, infra, Findings of Fact No. 88-91 are not relevant to this proceeding. They are included to summarize the evidence in the record and could be employed should the Commissioner arrive at a different conclusion.

WASTE includes materials to be recycled. reconditioned or reclaimed.

YOUR PREMISES means any.premises you own, rent, lease or occupy. It also includes premises you no longer own, rent, lease or occupy.

HASTE SITE means any site or location used, or being used, by or for you or others for the handling, storage, disposal, processing or treatment of waste.

YOUR WORK SITE means any site or location on which work is being performed by or for you when:

pollutants are brought on or to the site in connection with such work; or
the work is to test for. monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

WAST POLLUTANTS mean those pollutants which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any other person or organization for whom you're legally responsible.

(Ex. 62, p. 7 of 13).

There has'been as yet no court decision interpreting this language.

90. The 1985 ISO version of the pollution exclusion reads as follows:

It is agreed that the exclusion relating to the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants is replaced by the following:

(1) to bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

(a) at or from premises owned, rented or occupied by the named insured;
(b) at or from any site or location used by or for the named insured or others for their handling storage, disposal, processing or treatment of waste;
(c) which are at any time transported. handled, stored, treated. disposed of, or processed as waste by or for the named insured or any person or organization for whom the named insured may be legally responsible', or
(d) at or from any site or location on which the named insured or any contractors or subcontractor working directly or indirectly on behalf of the named insured are performing operations;

(i) if the pollutants are brought on Or to the

site or location in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) to any loss, cost or expense arising out of any governmental direction or request that the named insured test for, monitor, clean up, remove, contain. treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

(Ex. 71).

This exclusion language appears in the commercial general liability insurance policy which has been approved for use by the Minnesota JUA. (Ex. 72, pp. 3-4; Ex. 72-A).

91. It is the interpretation of the insurance industry that even with one of the above absolute pollution exclusions in place in a CGL policy there is still some coverage afforded for pollution. This coverage would exist under both the completed operations coverage of the policy and the products hazards coverage. Although these coverages do not specifically include coverage for pollution, the insurance companies believe that there would have to be a separate endorsement of the policy to apply the pollution exclusion to products hazards or completed works coverage. In other words, there would be pollution coverage afforded under these two other coverages because it is not specifically excluded.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Commissioner of Commerce and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Laws 1986, Ch. 455 40 and 41.

2. 'Mat the Department of Commerce has fulfilled all relevant substantive and procedural requirements of law or rule.

3. That the Department of Commerce has given proper notice of the hearing in this matter.

4. That the Commissioner of Commerce is authorized by Minn. Laws 1986 Ch. 455 40 to activate the Market Assistance Plan and the Joint Underwriting

Association "to provide assistance with respect to the placement of general liability insurance coverage on Minnesota risks for a class of business

5 That the coverage sought by each class of business appearing in this proceeding is within the line of general liability insurance.

6. That the burden of proof in this proceeding is upon each class of business seeking to continue the activation of the Market Assistance Plan and the Joint Underwriting Association on its behalf beyond the initial 180-day period.

7. That the Joint Underwriting Assoication is authorized to provide insurance coverage to any person or entity unable to obtain insurance through ordinary methods if the insurance is required by statute, ordinance, or otherwise required by law, or is necessary to earn a livelihood or conduct a business and serves a public purpose. Prudent business practice or mere desire to have insurance coverage is not a sufficient standard for the Association to offer insurance coverage to a person or entity. Minn. Laws 1986, Ch. 455, 21, subd. 1.

8. Pursuant to statute the following classes of business are automatically included as classes of business for which the Joint Underwriting Association may assist with the placement of general liability insurance coverage: day care providers, foster parents, foster homes, developmental achievement centers, group homes, sheltered workshops for mentally, emotionally or physically handicapped persons and citizen participation groups. Minn. Laws, Ch. 455, 21, subd. 1.

9. The following classes of business made no appearance at the hearing in this matter and are therefore in default in this case and nave not sustained their burden of proof to show that it is necessary to continue the activation of the Market Assistance Plan and Joint Underwriting Association for them beyond the 180-day period: grain buyers, public grain warehouse operators, environmental contractors, and electrical inspectors.

10. The following classes of business have sustained their burden of proof and made the showing described in Conclusion No. 7: riding stables, waterslides, and landfills.

11. The following classes of business have failed to demonstrate by a preponderance of the evidence the elements set out at Conclusion No. 7: asbestos abatement contractors and electronics/information technology firms.

12. That the questions of (1) whether the activities of certain persons or entities present a risk so great that they should not be offered insurance coverage, (2) whether coverage requested is for environmental impairment liability or product liability insurance, or (3) whether the activities to be covered are conducted substantially outside of the state of Minnesota, as described in Minn. Laws 1986, Ch. 455. 21. subd. 1, are questions within the jurisdiction of the Minnesota Joint Underwriting Association rather than the Commissioner of Commerce in this contested case proceeding.

13. That the Conclusions are arrived at for the reasons set out in the

Memorandum which follows and which is incorporated Into these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Commerce continue the activation of the Market Assistance Plan and the Joint Underwriting Association for the following classes of business: riding stables, waterslides, and landfills.

Dated: September 17 1986.

GEORGE A. BECK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve
its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. Tape Nos. 3155, 3199, 3351, 3319, 3874, 3318, 3643, 2022, 3376, 3504, 3452 and 3105. No Transcript Prepared.

MEMORANDUM

The ultimate issue in this case is whether or not the classes of business who appeared at the hearing have established the "necessity'' to activate the Minnesota Joint Underwriting Association (JUA) past 180 days. Ile standards by which that necessity is to be established are set out in Minn. Laws 1986 Chapter 455, Section 21, Subdivision 1. A person or entity must show that it is (1) unable to obtain insurance through ordinary methods, and (2) that the insurance is either required by statute, ordinance or other law or is necessary to earn a livelihood or conduct a business and serves a public purpose. Although the Insurance Federation suggested that the "public purpose" test is a third independent standard, it appears that it is to be coupled with the "livelihood" test. It would not be appropriate to apply it to the "required by law" test since a public purpose must be assumed if it is required by law. It is agreed by the parties that a guide to interpreting these standards is the language in the statute which states that ''prudent business practice or mere desire to have insurance coverage is not a sufficient standard . . ." This language seems to specifically relate to the first sentence in the subdivision which requires a showing of ''necessity" in order to obtain insurance coverage from the JUA.

The Insurance Federation argues in its post-hearing brief that five other issues are properly the subject of this contested case proceeding. Only the issues cited in the first paragraph above were included in the Notice of and order for-Hearing by the Commissioner. however. Despite inquiry by the Administrative Law Judge at the prehearing conference, the Federation did not raise these Issues at that time as being proper issues for the hearing. Accordingly, the order following the prehearing conference served upon the parties did not alert them to the possibility of these issues being considered at the hearing.

The Federation's argument as to these issues is based on two sentences which are also contained in Section 21, Subdivision I of the 1986 legislation. They read as follows:

> "Because the activities of certain persons or entities present a risk that is so great, the association shall not offer insurance coverage to any person or entity the board of directors of the association determines is outside the intended scope and purpose of the association because of the gravity of the risk of offering insurance coverage. The association shall not offer environmental impairment liability or product liability insurance, or coverage for

> activities that are conducted substantially outside the state of Minnesota unless the insurance is required by statute, ordinance. or otherwise required by law".

Based upon this language. the Federation argues that a class member must prove-that it does not present a grave risk, that the insurance it seeks does not include environmental impairment insurance or product liability insurance, and that its business activities are conducted substantially inside the State of Minnesota. The Department of Commerce as well as the class members argued,

however, that the determinations called for in the language quoted above are within the exclusive jurisdiction of the Board of Directors of the JUA and are determinations which are to be made by It on a case-by-case basis. They suggest that this should be done by the JUA either in evaluating an application for coverage based on its unique risk or in dealing with more generic risk issues relating to a class of business through drafting appropriate policy language limits and exclusions.

As the Department points out in its brief, the statute specifically refers to the "board of directors of the association" in discussing the question of risk. This language is immediately followed by the references to environmental impairment liability or product liability insurance and activities outside the State of Minnesota. It appears that the legislative intent is to vest the decision-making in regard to these factors in the Board of Directors of the JUA rather than the Commissioner of Commerce. These determinations would seem to be similar to those called for by Section 32 Subdivision 3 of the law which requires, among other things, an evaluation as to whether an applicant disregards safety standards for other laws or rules. There is nothing within the language of subdivision I which is incompatible with this conclusion. The Association can reject risks that are too great in the course of its underwriting and can issue policies with the necessary endorsements so as to avoid writing environmental impairment or product liability insurance. Section 25, Subdivision I of the 1986 law indicates that the Board has some discretion in adopting policy forms where a standard form is not appropriate. The Association is also, of course, capable of determining whether an applicant seeks coverage for activities conducted substantially outside the State of Minnesota. It is therefore concluded that the element of risk, the two excluded types of liability insurance, and whether the applicants activities are conducted outside the state are not items which are properly considered in this administrative hearing but rather are matters within the jurisdiction of the Board of Directors of the JUA to be decided subsequent to activation of the JUA for certain classes of business.

Owners or operators of three different riding stables appeared to testify at the hearing. Each testified as to his efforts at obtaining insurance. Each was cancelled by its insurance carrier. Each then pursued coverage through specialized brokers such as the Ark Agency which specializes in animal -insurance or the Rhulen Agency which specializes in riding insurance. This

effort satisfies the statutory requirement that a class member employ ordinary methods in seeking insurance. None of the class members had any success in finding coverage except for Mr. Wallberg. He was advised by the Knapp Agency that It would insure him for an annual premium of $1O,000. See Finding of Fact No. 23. The Insurance Federation argues that this demonstrates that general liability insurance was obtainable for riding stables. However, it was clear to Mr. Wallberg that he would be unable to pay a premium of that amount and remain in business. In fact, he closed down his riding stable from June I to June 21, 1986 despite the offer of insurance" Mr. Wallberg had experienced an operating loss during 1985 with an annual premium of $5,880. See Finding of Fact No. 21. Both Diamond T Ranch and El Rancho Manana also testified that they would not be able to remain in business if they had to pay a $10,000 premium. It is concluded that where coverage is offered at a prohibitive premium, this does not mean that liability insurance was obtainable within the meaning of the statute. It seems clear that insurance offered was not a viable option for these class members. Additionally, the

owner of Diamond T Ranch testified t hat the Knapp Agency was no longer selling insurance for riding stables when he contacted them. The evidence of unavailability is augmented by the fact that the market assistance program could not find coverage for the Diamond T Ranch as of August 5, 1986. See Finding of Fact No. 30.

The evidence presented in regard to whether or not liability insurance is necessary for the stables to conduct business included a showing that lessors of the trails used by the stables demanded liability insurance. The owners of the trails used by Red Barn Riding Stables have required liability insurance. Dakota County requires Diamond T Ranch to carry general liability insurance to use its parks. Additionally. the class members demonstrated that their clients required them to have liability insurance. Lodges in the area will not refer clients to the Red Barn Riding Stables unless it is insured. The Girl Scouts and the Minnesota Department of Natural Resources will not send business to Diamond T Ranch unless it has liability insurance. In fact the Girl Scouts ceased doing business with Diamond T Ranch for a period of time when it was without liability insurance. El Rancho Manana also found that non-profit organizations and schools will not contract with them if they are uninsured. The Insurance Federation argued that some stables were apparently doing business without insurance. However, that fact does not overcome the strong showing by the riding stables that lessors and clients make liability insurance necessary to the conduct of their business. The Insurance Federation also argued that the riding stables presented a grave risk of loss, a question which is reserved to the JUA.

Finally, the riding stables demonstrated that insurance serves a public purpose. Class members offer recreation for tourists, families and organizations like the Girl Scouts. As Mr. Ward testified, if insurance is unavailable, riding stables will be a dead industry and a person will have to own a horse in order to ride one. It would mean that children might not have the opportunity to ride a horse. There is, of course, a public purpose also

in seeing that children and others who ride.rental horses can be compensated in the event of an accident.

It is therefore concluded that the class of riding stables has satisfied its burden of proof to show that they were unable to obtain insurance through ordinary methods and that insurance is necessary to conduct their business and that it serves a public purpose. The evidence indicates that they do not desire to be insured merely as a prudent business practice!. This is indicated by the fact that the Red Barn Riding Stables closed their business; by the fact that El Rancho Manana no longer offers rental rides and by the requirements 'Imposed upon the stables by the lessors and the organizations providing clients to them.

The testimony on behalf of waterslides offered by the Burnsville Beaver Mountain Waterslide indicates that insurance companies were withdrawing from this type of coverage in 1986. Two large specialized brokers who had formerly offered this type of insurance, namely High Country and Frank B. Hall and Company, were unable to provide coverage after writing it for approximately 500 water parks in 1985. In 1986 Beaver Mountain was advised by the World Water Park Association of four companies offering coverage. Two of them were Bermuda captive insurance companies outside the regulation of the Minnesota Department of Commerce. A third required minimum receipts for which Beaver

mountain did not qualify. Beaver Mountain contacted the fourth, the Lockton insurance Agency, but it did not write any insurance since it could not attract sufficient premiums to interest an insurer. One of the Bermuda captive insurance companies, namely Aquatic Recreation Insurance Company, did offer to insure Beaver Mountain at a premium of $16,000. It would not, however, specify the contents of the coverage before Beaver Mountain wired its premium to Bermuda. Beaver Mountain determined not to send the premium since the company was not regulated by the State of Minnesota. The Insurance Federation argues that insurance was available within the meaning of the statute due to the offer from Aquatic. It suggests that Beaver Mountain ignored the Aquatic offer simply because it hoped to obtain JUA coverage. It must be concluded, however, that the Aquatic offer of coverage is not within the "ordinary method" language in the, statute. As the Department points out, such insurance would have none of the protections of the Minnesota Insurance Guaranty Association Actor the Minnesota Surplus Lines Insurance Act. It does not appear likely that the legislature intended that Minnesota businesses would be required to do business with such an insurer as an ordinary method of obtaining insurance.

In regard to whether or not the insurance is necessary to conduct the business, Douglas Stevens, one of Beaver Mountain's owners, testified that Beaver Mountain was being purchased on a contract for deed and that the contract for deed required the purchasers to maintain liability insurance in order to protect the contract vendors. It is therefore possible for the seller to cancel the contract because the purchasers have not complied with its terms. Mr. Stevens demonstrated the public interest involved in having insurance in this business by testimony indicating that his waterslide is a family activity which also serves handicapped groups and provides employment for youth during the summer. It is not unlikely that the public using such a facility would assume that it maintains liability insurance. There is a public interest in insuring compensation for the children who use this facility. It is therefore concluded that Beaver Mountain has sustained its burden of proof to show a need for the continued activation of the JUA and MAP for the class of business of waterslides.

Representatives of six landfills appeared at the hearing and testified in support of continuing the activation of the JUA and the MAP for the class of landfills. Each testified that their insurance had been cancelled or was about to be cancelled. The landfills used the services of specialized insurance brokers such as the John H. Crowther Agency in an unsuccessful attempt to locate insurance. The Tellijohn Landfill contacted seven insurance companies as well as five agencies. It appears that 12 of 18 privately-owned landfills contacted in Minnesota have recently had their general liability insurance cancelled or have been notified that it will be cancelled shortly. See Finding of Fact No. 73. Additionally, the MAP notified Ponderosa of Blue Earth County on August 4. 1986 'that it had been unable to secure coverage for the landfill. In its post-hearing brief, the Insurance Federation apparently conceded that the owners and operators of many landfills in Minnesota have a serious liability insurance problem. Federation Brief, page 17. The Federation did submit a letter from AIG indicating that it was a market for landfill operators but that the class was subject to engineering and there must be adequate financial backing. (Exhibit 70.) The letter does not suffice to rebut the extensive testimony concerning the efforts of the six landfills to obtain insurance. They have established they were unable to

obtain it through ordinary methods. ''Ordinary methods'' does not compel an applicant to seek out excess and surplus lines brokers since that was not a normal method in the past for them to obtain insurance. The statutory MAP procedure would not be very meaningful if an extensive search was required of an applicant before it applied for coverage.

The record also establishes that liability insurance is required for landfills by law. In the case of five of the six landfills who appeared, a county ordinance specifically requires landfill operators to carry general liability insurance. In addition to these five there are other counties that also require general liability insurance. (Exhibit 13.) The Insurance Federation has suggested that if a letter of credit or a variance is an alternative to the insurance requirement, then insurance is not required by law. It appears that due to recent amendments letters of credit could be submitted in three of the counties in lieu of insurance. The landfills testified, however, that they could not afford the fee that would be required for such a letter of credit. In the case of the Tellijohn Landfill the letter of credit was a temporary measure until insurance coverage was obtained. The record reflects that a letter of credit is not a viable alternative to the insurance required by county ordinance for those who testified. Neither are class members required to prove the unavailability of a variance. They only need to show that insurance is required by last.

Testimony was also presented as to the public purpose served by insurance for landfills. A_representative of the Minnesota Pollution Control Agency testified-that there is a public interest in insuring an operator's financial ability to fund necessary sites closure and post-closure care for a landfill. He also testified as to the disruption caused by site closings due to a lack of insurance. There is also a public interest served by providing insurance which permits compliance with county ordinances which are enacted to serve the public good.

In its post-hearing brief. the Insurance'Federation also argued that the class of landfills could not be further activated because a CGL policy for

landfills could not be issued which.would not contain environmental impairment liability insurance. See Findings of Fact No. 88 through 91. As is discussed earlier, this question is reserved by the statute for the consideration of the Board of Directors of the JUA. It is possible that they may decide that a CGL policy cannot be issued without some environmental liability coverage. However. that decision is their's alone.

Two members of the electronics-information technology class testified at the hearing as well as the director of the Minnesota Council of the American Electronics Association (AEA). Each of the companies attempted to find directors and officers (D&O) coverage through major business insurance brokers such as Alexander and Alexander, Marsh and.McLennon and the David Agency. Additionally. they were unable to obtain coverage through the nationwide AEA program for D&O coverage. The Insurance Federation suggests that the testimony of David Lappin demonstrates availability. Mr. Lappin testified that the Home Insurance Company is in the market since June 15, 1986 with a new program based upon a different underwriting philosophy. The program is targeted specifically at high tech companies which cannot meet traditional D&O underwriting standards. Mr. Lappin did indicate that he would be interested in working on the Zytec account but not with ETA Systems. Additionally, the

Federation points to the testimony of Kathleen Gallagher of the John H. Crowther Agency as to the availability of D&O insurance through several companies. Ms. Gallagher, however, was not personally familiar with D&O insurance as she was with asbestos abatement contractor coverage. Her testimony cannot be given great weight. It is concluded that the class members have proved by a preponderance that directors and officers liability insurance coverage is unavailable through ordinary methods. Clearly, the two companies pursued normal business channels for this type of coverage. The fact that one insurance company has very recently started a new program cannot be decisive since the evidence'indicates the coverage was unavailable to these two companies in the insurance industry generally when they made a good faith search for it. Their actual experience must be credited over a mere possibilityof coverage. If the Home Insurance Company will provide coverage, that can be done through the Market Assistance Plan, subsequent to activation.

The evidence in support of showing that insurance coverage Is necessary for the conduct of their business was similar on the part of each company The companies stated that well-known outside directors are necessary to raise capital through debt and equity in order to grow. The absence of insurance may therefore hamper the growth and development of these electronic businesses. One director that Zytec was courting declined to join the board because of the lack of insurance. However, no directors have left the board. ETS Systems lost one of its outside directors due to a lack of insurance. ETA Systems has amended its by-laws to indemnify its directors in the event of a lawsuit. The Federation argues that the goal of obtaining financing or eventually going public with their securities falls far short of the "necessity" standard but is rather a "prudent business practice or mere desire to have insurance coverage.''

A determination of this issue requires a closer examination of the meaning of the word "necessary" in the statute. The American Heritage Dictionary, Second College Edition defines "necessary" as "absolutely essential or indispensable." Webster's New Collegiate Dictionary, 1975 Edition, defines "necessary" when used as an adjective, as "of an inevitable nature", or

"absolutely needed". Statutory language is usually construed in its common and ordinary meaning. Black's Law Dictionary notes, however, that the word "necessary" may express different degrees and that "it may mean something which in the accomplishment of a given object cannot be dispensed with , or it may mean something reasonably useful and proper. and of greater or lesser benefit or convenience, and its force and meaning must be determined with relation to the particular object sought." Black's Law Dictionary. 5th Edition. The Minnesota Supreme Court has also acknowledged that the word has a variable meaning. Marshall County v. Rokke, 134 Minn. 346, 159 N.W. 791 (1916).

Ascertaining the legislative intent in this case is aided by the legislative direction that prudent business practice or mere desire to have insurance coverage is not a sufficient standard. Every law must be construed to give effect to all its provisions. Minn. Stat. 645.'16. The phrases "prudent business practice" and "mere desire" suggest that the legislature intended a contrasting interpretation of "necessary". This legislative direction, as well as the ordinary meaning supplied by the dictionary definitions, compels a conclusion that the legislature was using the word necessary in the sense of essential rather than useful or convenient.

Measured against this standard, the electronics and information tech companies have not demonstrated that the insurance is essential. D&O coverage is necessary to pursue a particular, business strategy for the company, but this seems closer to a " prudent business practice . " Apparently, one of the significant factors working against insurance coverage for these companies is a short, less than five year, financial history. Additionally, a lack of profitability was cited as a factor. These are factors which may shortly change and therefore affect the availability of insurance :overage. The record also indicates that at least one of the companies his found an alternative, namely indemnification of its directors by the corporation as at least a temporary means of overcoming the unavailability of insurance. The record also demonstrates that as large a corporation as Control Data has been able to function without directors and officers liability insurance. This suggests that it is not essential to the conduct of a business.

The facts offered to prove necessity by the high tech companies contrast with those of other classes appearing in this proceeding. Other classes have demonstrated that they cannot continue in business without liability insurance either because it is required by law, by contract, by lessors or by customers. In the case of the electronics-information tech companies, the question is the degree of success to be achieved by the companies. The language of the statute suggests that the JUA is to be a last resort for those who must have insurance but cannot get it. It does not appear that the JUA was intended to serve as a tool to assure or assist in the growth of Minnesota companies The testimony indicated that young companies may be hindered in their development or that the insurance situation will inhibit their ability to function. It did not, however, establish that they would be unable to conduct their business without the insurance. It is concluded that the legislature contemplated a greater showing in regard to the criteria of necessity and that the class members have failed to establish it by a preponderance of the evidence.

The showing of a public purpose on behalf of the electronics-information tech companies includes testimony as to their importance to the Minnesota

economy. Zytec, for example, provides 600 jobs in Minnesota and ETA Systems provides over 200. The electronics industry is important in Minnesota. In addition. the Minnesota Department of Energy and Economic Development supported the availability of directors and officers liability insurance through the JUA for electronics companies as serving a public purpose. The creation of jobs and expansion of employment opportunities in the State of Minnesota is a sufficient public purpose within the meaning of the statute.

The Insurance Federation has also argued that the class described in the notice of and order for hearing is not a "legitimate" class of business. The class includes businesses eligible for membership in the AEA and takes in numerous standard industry classification &SIC) code categories. (Exhibit 27B.) The Federation argues that there is no rational connection for equating membership in a trade association with demonstrated need for participation in the JUA. There is however, little guidance in the statute as to what may constitute a class of business. What does appear clear is that the Commissioner of Commerce has given discretion to define a class of business. Minn. Laws 1986, Chapter 455, Section 40. It does not appear that that discretionary decision is meant to be a subject of challenge in this contested case.proceeding.

The Federation has also argued that directors and officers liability Insurance is not "general liability insurance." Section 4C of the session law authorizes the commissioner to provide assistance "with respect to the placement of general liability insurance coverage." The Federation suggests that D&O coverage is a narrow, highly specialized form of liability insurance which was not contemplated by the legislature to be included in the phrase "general liability insurance." However, the department convincingly argues that while directors and officers liability coverage is a separate insurance policy from comprehensive general liability, it is still within the line of general liability insurance as the term is used in statute. While the broad line of general liability insurance is authorized in the statute in Minn. Stat. 60A.06, subd. 1 (13), there is no separate statutory line of directors and officers liability insurance. Department Brief, p. 8. The Federation also suggested in its post-hearing brief that those companies appearing at the hearing presented an unacceptable gravity of risk. Again, that question is reserved for the JUA.

one class member testified on behalf of the class of asbestos-abatement contractors; namely, Dunsheath Construction and Engineering. There are approximately 20 such contractors in Minnesota. Dunsheath's showing in regard to its ability to obtain insurance through ordinary methods included the fact that its comprehensive general liability policy was cancelled effective January 16, 1986. Dunsheath's insurance agent then contacted seven insurance companies as well as Casualty Underwriters Inc., an excess and surplus lines agency, but found that none could provide a CGL policy without an asbestos exclusion. He also contacted the John H. Crowther Agency and learned that it was issuing a policy to asbestos abatement contractors through Great American Surplus Lines Insurance Company. After examining this policy, the agent recommended to Dunsheath that it did not provide effective covereage for the company. The Insurance Federation argues that this policy is comprehensive general liability insurance within the meaning of the statute. The record indicates that this policy was sold to at least six of Dunsheath's competitors in Minnesota and was offered to approximately 12 of them.

Dunsheath and its insurance agent had two objections to the Great American policy. First, it contains an exclusion which reads as follows:

> "This policy shall not apply under the comprehensive general liability coverage part in Item III. contractual liability of the special liability endorsement "To bodily injury to any employee of the insured; or the employees or (sic) the premises owner or his real estate manager; or the employees of general contractors to which the insured is subcontracted; or the employees of the insured's subcontractors, if their designated job duties require them to be in an asbestos abatement area".

(Exhibit 5, last page.) Dunsheath argues that this clause renders the policy inadequate since the most likely place for an accident to occur would be in that part of a building in which asbestos is being removed. It also argues that the exclusion does not meet the requirement for state contracts which mandates CGL coverage for bodily injuries including sickness and disease. Secondly, the Great American policy is written on a claims-made basis which

means it provides coverage only for claims made during the policy period.
Since asbestos-related diseases can manifest themselves anywhere from 10 to 40
years later, Dunsheath argues that a claims-made policy is inadequate for its
business. It also argues that the state contracts require CGL on an
occurrence-basis.

The Insurance Federation suggests that the clause quoted above is simply a
workers' compensation exclusion which means that Dunsheath's employees are not
covered by this policy but would be covered under the company's workers'
compensation policy as would other employees be looking to their employer's
workers' compensation carriers for coverage. It states that claims brought by
any persons using or visiting the building in which the work is being done are
covered. The Federation also points out that a CGL policy which has been
,adopted by the JUA is a claims-made policy. (Exhibit 72.) The Federation
therefore argues that since Dunsheath's competitors have accepted the policy
in question, it is adequate coverage.

There can be little doubt based upon this record that insurance for an
asbestos-abatement contractor serves a public purpose. The record supports a
conclusion that asbestos is a potentially dangerous material and that
contractors such as Dunsheath are necessary in order to remodel buildings in a
safe manner or to make existing conditions safe for the public. It is also
clear that Dunsheath requires CGL insurance generally in order to obtain
contracts such as those described in Exhibit 6 for the Minnesota
Transportation Building and a contract to be let by the State University
Boar& (Exhibit 6.) See Finding of Fact No. 15.

The question which must be decided, however, is whether the Great American
policy constitutes available insurance within the meaning of the statute and
whether the specific coverage sought by Dunsheath is necessary to permit it to
conduct its business. It is concluded that Dunsheath has not proved by a
preponderance of the evidence that the statutory criteria have been met.
Although it alleges that the state specifications call for an occurrence type

policy, the specs do not specifically state that. The specifications merely call for insurance protecting the contractor from claims for bodily injuries arising from operations under the contract without specifying a claims type or occurrence type policy.

Secondly, the record indicates that Dunsheath's competitors have found the Great American policy acceptable in order to do business. It is apparently being accepted by those entities Issuing specifications for projects. The language quoted above, to which Dunsheath objects, is in addition to the usual workers' compensation exclusion on page 2 of the policy at Part I.(i). See also, Ex. 62, p. 7 of 13. It appears to go farther than a workers' comp exclusion in that. for instance, it excludes coverage for the employees of the premises owner. In the case of a project at the State Office Building, for example, this would apparently exclude all state employees. Nonetheless, while this policy may provide less coverage than a typical CGL policy, it is being used In the industry and accepted by those entities issuing specifications. It is therefore concluded that Dunsheath has failed to show that the Great American insurance is not adequate liability insurance to conduct its business or that the specifications submitted require an occurrence-basis policy. Rather, it appears from this record that Dunsheath's desire for a specific type of policy, which may be a sound business judgment,

is closer to the "prudent business practice" described in the statute, which is not a sufficient standard for the Association to offer insurance coverage. While Dunsheath would be better protected by an occurence type policy without an exclusion, it can conduct its business with the available policy.

G.A. B.